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No.....

IN THE

Supreme Court of the United States

OCTOBER TERM 1970

PARLEY PROBST, *Petitioner,*

vs.

THE UTE INDIAN TRIBE OF THE UINTAH AND OURAY RESERVATION, and ORANNA B. MOOSMAN, ADMINISTRATRIX of the Estate of ELIZABETH C. BUMGARNER POO-WEGUP, deceased, *Respondents.*

APPENDIX TO PETITION FOR WRIT OF CERTIORARI ON BEHALF OF PARLEY PROBST TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Appendix No. 1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

UTE INDIAN TRIBE of the Uintah and Ouray Reservation, a body politic and corporate of the United States of America, *Plaintiff.*

vs.

PARLEY PROBST and ORANNA B. MOOSMAN, Administratrix of the Estate of Elizabeth C. Bumgarner Poowegup, deceased, *Defendants.*

Judgment No. C-172-67

The above entitled action came on regularly for trial before the court on the 5th and 6th days of September, 1968, before the Honorable A. Sherman Christensen, United States District Judge, the court sitting without a jury; John S. Boyden, Steven G. Boyden, and Ezra T. Clark appearing as attorneys for the plaintiff, and Wayne L. Black, appearing as attorney for the defendant Parley Probst, and David Sam and James J. Smedley appearing as attorneys for the defendant Oranna B. Moosman, Administratrix of the Estate of Elizabeth C. Bumgarner Poowegup, deceased; and evidence, both oral and documentary, having been intro-

duced by the respective parties hereto; and the court having heard the evidence and the arguments of counsel, and having fully considered the same, and having made its findings of fact and drawn its conclusions of law:

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED:

1. That the Administratrix's deed, dated September 21, 1964, described in the complaint purporting to convey the property hereinafter described from the defendant Oranna B. Moosman, Administratrix of the Estate of Elizabeth C. Bumgarner Poowegup, deceased, to the defendant Parley Probst recorded October 5, 1964, as Entry No. 86515, Book "49," pages 559-560 of the Records of the County Recorder, Wasatch County, State of Utah, and the order of the probate court authorizing said Administratrix's deed be, and the same is hereby, vacated, set aside, and annulled and declared of no force or effect,

2. That the defendant Oranna B. Moosman, Administratrix of the Estate of Elizabeth C. Bumgarner Poowegup, deceased, is the absolute owner of and holds the title to the real property described and referred to in the complaint and pleadings on file, and hereinafter in this judgment described, subject only to the interest of the defendant Parley Probst as hereinafter described, and that said plaintiff and the defendant Parley Probst have not any right, title, or legal or equitable interest in or to said property or any part thereof, except as to the interest of the defendant Parley Probst as hereinafter described; and that said plaintiff and defendant Parley Probst be and they are hereby denied the relief prayed for in their pleadings herein.

3. That the defendant Oranna B. Moosman, as Administratrix of the Estate of Elizabeth C. Bumgarner Poowegup, deceased, have and recover possession of all of the real property hereinafter described together with all improvements and appurtenances thereunto belonging.

4. That all persons claiming under plaintiff or the defendant Parley Probst be and they are hereby forever barred from any and all claim of right or title to said premises or any part thereof.

5. That the defendant Parley Probst has a lien on the hereinafter described property to secure the sum of $35,000.00, together with interest at the rate of 6% per annum on $33,516.00 from October 28, 1959, to November 11, 1960; that after notice of the entry of this judgment and within ten days after the above referred to sums have been tendered to the defendant Parley Probst that the defendant Parley Probst execute and deliver to the defendant Oranna B. Moosman, Administratrix of the Estate of Elizabeth C. Bumgarner Poowegup, deceased, under his hand and seal, and duly witnessed and acknowledged, a deed of conveyance and a release to the defendant Oranna B. Moosman, Administratrix of the Estate of Elizabeth C. Bumgarner Poowegup, deceased, of all claim in and to said premises; said release including a release of mortgage.

6. That the plaintiff and the defendant Oranna B. Moosman, Administratrix of the Estate of Elizabeth C. Bumgarner Poowegup, deceased, do have and recover of the defendant Parley Probst their taxable costs and disbursements—a bill of costs and disbursement to be filed as provided by Rule 15 of this court.

7: That if the defendant Parley Probst does not release and convey to the defendant Oranna B. Moosman, Administratrix of the Estate of Elizabeth C. Bumgarner Poowegup, deceased, the hereinafter described property as herein ordered, then said defendant Parley Probst shall be divested of the title of said property and said title shall vest in said Administratrix by operation of this decree.

8. The following is a description of the lands affected by this judgment: Said property being situated in Wasatch County, State of Utah, and described as follows, to-wit:

> All of Sections 13, 14, 23, 24, and 26 in Township 4 South, Range 11 West, U.S.B. & M., containing 3,200 acres, more or less.
>
> Subject to reservation in the United States of all minerals and mineral rights.
>
> TOGETHER with all improvements and appurtenances thereunto belonging, including all water rights.

Dated this 7th day of January 1969.

s/ A. Sherman Christensen

A. SHERMAN CHRISTENSEN
UNITED STATES DISTRICT JUDGE

Appendix No. II

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

UTE INDIAN TRIBE of the Uintah and Ouray Reservation, a body politic and corporate of the United States of America, *Plaintiff*,

vs.

PARLEY PROBST and ORANNA B. MOOSMAN, Administratrix of the Estate of Elizabeth C. Bumgarner Poowegup, deceased, *Defendants*.

No. C 172-67

Findings of Fact and Conclusions of Law

The above entitled matter came on regularly for trial before the Court on the 5th and 6th days of September, 1968, before A. Sherman Christensen, United States District Judge, with plaintiff being represented by John S. Boyden, Stephen G. Boyden, and Ezra T. Clark, Jr.; and the defendant Parley Probst being represented by Wayne L. Black; and Oranna B. Moosman, Administratrix of the Estate of Elizabeth C. Bumgarner Poowegup, deceased, being represented by David Sam and James J. Smedley, and the Court having heard

the evidence adduced and being advised in the premises, now makes and enters the following:

FINDINGS OF FACT

1. The plaintiff is an Indian tribe with a governing body duly recognized by the Secretary of the Interior, a corporate charter having been granted by the Secretary of the Interior on the 6th day of July, 1938, which charter was ratified according to law, pursuant to Section 17 of the Act of June 18, 1934 (48 Stat. 984), on August 10, 1938, by a majority vote of the adult members of the Ute Indian Tribe living on the Uintah and Ouray Reservation in Utah.

2. The defendant, Parley Probst, is a resident of Heber City, County of Wasatch, State of Utah, and claims to hold fee simple title to the real property hereinafter described.

3. The defendant, Oranna B. Moosman, is a resident of Neola, County of Duchesne, State of Utah, and is the administratrix of the Estate of Elizabeth C. Bumgarner Poowegup, deceased, which deceased person is one and the same person as Elizabeth C. Bumgarner.

4. The real property which is the subject of this action is located within the territorial jurisdiction of this Court, said property being situated in Wasatch County, State of Utah, to-wit:

> All of Sections 13, 14, 23, 24 and 26 in Township 4 South, Range 11 West, Uintah Special Base and Meridian, containing 3,200 acres, more or less. Subject to reservation in the United States of all mineral and mineral rights.

Including all water rights and other appurtenances thereto.

5. On September 21, 1959, Elizabeth C. Bumgarner, now deceased, then a mixed-blood member of the Ute Indian Tribe, was the successful bidder at the sale of the said lands held in accordance with U.S.C., Title 25, Section 677 (A *seq.*, and the rules and regulations thereafter duly issued by the Secretary of the Interior pertaining to said sale, for the sum of $26,016.

6. On October 28, 1958, prior to receipt of the patent to said property by said Elizabeth C. Bumgarner, and prior to termination of federal supervision over said real property, the defendant Parley Probst and Elizabeth C. Bumgarner entered into a written agreement wherein Elizabeth C. Bumgarner agreed to sell and Parley Probst agreed to purchase said real property for the sum of $35,000. In said contract Elizabeth C. Bumgarner agreed as follows:

(a) To obtain a patent to said property from the United States of America pursuant to procedure of Public Law 671 of the 83rd Congress, 2nd Session.

(b) To apply $26,016 received from Parley Probst, and acknowledged by her, to the purchase of said land pursuant to her bid therefor with the Affiliated Ute Citizens of Utah, Fort Duchesne, Utah.

(c) To offer said land to the members of the Ute Indian Tribe pursuant to Section 15 of Public Law 671 as soon as regulations were formulated by the Secretary of the Interior.

(d) That upon the failure of anyone to bid on said land she would then convey said tract by warranty deed to Parley Probst.

(e) That in the event a bid in excess of $35,000 cash was made for said property at the offering required therefor, that she would do the following:

(1) Notify Parley Probst and permit him to make a higher bid if he wished.

(2) If he did not so wish to repay to him all moneys which he had advanced, together with interest thereon at the rate of 6 per cent per annum, for the period in which she would have had said funds.

(f) To execute a real estate mortgage on said property to said Parley Probst creating a lien on said land to secure repayment of the funds so advanced in the event Elizabeth C. Bumgarner was unable to perform said contract or violated any of the provisions of the agreement.

(g) To immediately deliver possession of said tract of land to Parley Probst.

Said contract was neither submitted to nor approved by the Secretary of the Interior or his authorized representative.

7. On October 28, 1959, Elizabeth C. Bumgarner executed a mortgage upon said property to Parley Probst in the sum of $35,000. Said mortgage was recorded at the request of Glen M. Hatch on October 29, 1959, as Entry No. 79888 in Book 36, page 59 of the

records of Wasatch County, Utah. Said mortgage was neither submitted to nor approved by the Secretary of the Interior or his authorized representative.

8. Parley Probst, on October 28, 1959, issued check No. 5488 payable to the order of the Bureau of Indian Affairs for the sum of $26,016; also on October 28, 1959, Parley Probst issued check No. 5489 payable to the order of Elizabeth C. Bumgarner for the sum of $7,500; further on October 28, 1959, Parley Probst issued check No. 5490 payable to the order of Elizabeth C. Bumgarner for the sum of $1,484. Check No. 5490 was placed in escrow with R. Earl Dillman, Attorney at Law, of Roosevelt, Utah.

9. Elizabeth C. Bumgarner determined to dispose of her interest in the lands, the subject of this litigation, on or prior to October 28, 1959, but there is nothing in the record upon which the court could find that she then or at any other time knew and understood that a determination to sell under such circumstances and subject to posting as required by the contract was illegal or improper, and the court finds, plaintiff having the burden of proof, that Elizabeth C. Bumgarner entered into said contract in good faith.

10. The regulations as set out in 25 C.F.R. Part 243, were promulgated by the Secretary of the Interior on August 11, 1960.

11. On September 20, 1960, the United States of America issued to Elizabeth C. Bumgarner Patent No. 1212875, conveying said real property containing among other provisions the following:

> Prior to August 27, 1964, the grantee hereunder shall not dispose of any interest in the property

herein conveyed without first offering it to the members of the full-blood and mixed blood groups of the Ute Indian Tribe of the Uintah and Ouray Reservation in accordance with regulations now or hereafter prescribed by the Secretary of the Interior pursuant to the Act of August 27, 1954 (68 Stat. 868). This provision shall also apply to any successor in interest of such group as defined in the act, it being the intention of this provision to effectuate the purpose of section 15 thereof.

Said patent was recorded on November 14, 1960, as Entry No. 81179, page 470, Book 38 of the records in the office of the County Recorder in and for Wasatch County, State of Utah, at the request of Glen M. Hatch.

12. On November 11, 1960, Elizabeth C. Bumgarner and Parley Probst executed a second writing which Parley Probst had caused to be prepared and which by its terms amended and became part of the agreement of October 28, 1959, providing among other things the following:

(a) That the check in escrow for $1,484 be released to Elizabeth C. Bumgarner even though the conditions originally stated in the first agreement as prerequisite to the delivery had not been performed.

(b) That the offering to members of the Ute Indian Tribe required by Section 15 of Public Law 671 would not be made until such time as Parley Probst requested the same be made.

(c) That in the event Parley Probst requested that said offering to be made to members of the Ute Indian Tribe, Elizabeth C. Bumgarner would

provide in her offering that she may reject any and all offers made to her, and that in making said offers she would stipulate that the sum to be paid therefor must be an amount equivalent to $35,000 plus an amount equivalent to interest at the rate of 6 per cent per annum on $35,000 computed from October 28, 1959, and that, furthermore, she would reject any offer equal to that amount or higher.

(d) That said real estate mortgage would apply to the provisions of this agreement.

Said agreement of November 11, 1960, was neither submitted to nor approved by the Secretary of the Interior or his authorized representative.

13. The defendant Parley Probst was an experienced businessman in real estate and other transactions and all acts of Attorney Glen M. Hatch in relation to the transactions involved in this litigation were authorized by the defendant Parley Probst. The said agreement was prepared as the result of Elizabeth C. Bumgarner's need and desire for the $1,400 held in escrow pending posting of the sale and of information which had come to the knowledge of Probst that others were interested in buying said property and that there would likely be competition if said land were posted for bidding, and a determination on Probst's part to hold up any offering until others interested in the land appeared to lose interest in the project, or as Probst's attorney testified until "these people who manifested this interest, who had no better rights than we did, would cool down on the thing." Mr. Probst was concerned that

members of the tribe might bid for the property in order that the white persons whom he had talked to could ultimately acquire it.

14. Such bidding likely would have been to the advantage of Elizabeth C. Bumgarner in increasing her realization upon the sale of the property through bidding; that Parley Probst realized this, but failed to disclose his knoweldge of the interest of other people in the property, the real intent of the modified agreement and its legal impropriety; and it is fair to infer from the record, and the court finds, that Elizabeth C. Bumgarner at said time was ignorant of these considerations, had family problems, was frequently under the influence of liquor, was in dire need of money and as a result was improperly induced by Probst and his attorney to sign said agreement.

15. That a reasonable time within which to make said offering pursuant to law expired after November 1960 and prior to the death of Elizabeth C. Bumgarner.

16. After the death of Elizabeth C. Bumgarner on November 27, 1963, Oranna B. Moosman was appointed administratrix of the Estate of Elizabeth C. Bumgarner Poowegup by an order of the Probate Division of the Fourth Judicial District Court, Duchesne County, State of Utah, on January 20, 1964. Letters of Administration were subsequently issued by said Court on January 30, 1964. Said administratrix, Oranna B. Moosman, was discharged and her Letters of Administration vacated on January 25, 1965, by an order of the Probate Judge at the time of the final distribution. The Probate Court subsequently approved her reappointment on December 4, 1967, subject to qualifying as required by law.

Letters of Administration were subsequently issued on June 14, 1968.

17. The defendant Parley Probst submitted a creditor's claim dated March 23, 1964, to the Probate Division of the Fourth Judicial District Court of Duchesne County, State of Utah, to which he attached a copy of the agreement of October 28, 1959, and said mortgage between himself and the deceased, without then or thereafter disclosing to the Court the agreement of November 11, 1960.

18. The failure of the defendant Parley Probst and his attorney, Glen M. Hatch, to disclose to the Probate Court and to the attorney of the Estate of Elizabeth C. Rumgarner the purported agreement of November 11, 1960, was an act with fraudulent intent and a part of a scheme to avoid the provisions of 25 U.S.C. 677i, 677n, 25 C.F.R. Part 243 and the covenant running with the lands.

19. The creditor's claim of Parley Probst, the petition for authorization to execute administratrix's deed, the decree authorizing administratrix to execute the deed, and the administratrix's deed were all prepared by attorney for Parley Probst.

20. Pursuant to said creditor's claim and said petition to execute an administratrix's deed dated September 9, 1964, an order was issued by the Court dated September 21, 1964, authorizing the administratrix to execute a deed conveying said real property to Parley Probst. Thereafter, on the 21st day of September, 1964, defendant Oranna B. Moosman did execute and deliver to defendant Parley Probst an administratrix's deed

conveying said property to defendant Parley Probst. At the request of his attorney, on October 5, 1964, said deed was recorded as Entry No. 86515, Book 49, pages 559-560 of the records of the County Recorder, Wasatch County, State of Utah.

21. The Creditor's Claim, the Petition for Authorization to Execute Administratrix Deed, and the Administratrix Deed, were submitted and acted upon pursuant to the undisclosed and continuing intent of Parley Probst to obtain said property in disregard of the posting requirement aforesaid.

22. At the time of the filing of Creditor's Claim and at all times during the probating of the Elizabeth C. Bumgarner Poowegup Estate neither the Probate Court, Administratrix, nor the attorney for the Administratrix had knowledge of the November 11, 1960 agreement.

23. In executing the November 11, 1960 agreement Parley Probst and Elizabeth C. Bumgarner were not in pari delicto. Probst unknown to her had already determined to circumvent the requirements of posting to prevent the receipt of a greater sales price by her and unknown to her had drafted and designed said agreement for this purpose. There was no culpability on her part when she executed the November 11, 1960 agreement or at any other time which in equity and good conscience should bar the rights awarded herein in favor of her estate.

24. That by the design and planning of Parley Probst an offering was not made as required by Sec. 15 of Public Law 671 (25 USCA 677n) to members of the

tribe in accordance with the form designated by the Secretary within a reasonable period of time after there had been a determination to sell as contemplated by the Act and or after the rules governing the form of the offering had been promulgated by the Secretary. That a reasonable period of time for the offering expired prior to November 27, 1963.

25. The failure of the defendant Parley Probst to disclose to the Probate Court and to Oranna B. Moosman, Administratrix of the Estate of Elizabeth C. Bumgarner Poowegup, the agreement of November 11, 1960, was an act of material misrepresentation, concealment, and fraud upon the Estate of Elizabeth C. Bumgarner in view of the allegations of the Creditor's Claim which Probst caused to be filed. If Probst had revealed the true facts with reference to the November 11, 1960 agreement and his intent and purpose to avoid posting and bidding as required by law, there would have been no Administratrix Deed issued.

26. The Agreement of November 11, 1960, was not discovered by Oranna B. Moosman until sometime during the summer of 1966, nor did she have notice or knowledge otherwise before that time that a fraud had been perpetrated against the estate.

37. As early as November 18, 1959, plaintiff, the Ute Indian Tribe of the Uintah and Ouray Reservation, had knowledge of the October 28, 1959 executory sale by and between Elizabeth C. Bumgarner as Seller and Parley Probst as Buyer, said knowledge being evidenced by the minutes of the meeting of said tribe on November 19, 1959. While plaintiff was further aware of Probst's continuing interest in 1960, it had no notice or knowl-

edge of any fraud in connection with the sale of said land (except as may have been constructively given by the recording of the Administratrix Deed without posting having been made) until the year before the commencement of this action, September 20, 1967.

28. The evidence is equivocal and uncertain whether the agreements of October 28, 1959, and the mortgage of October 28, 1959, were instrumentalities and part of a scheme, artifice and design by Parley Probst to unlawfully purchase said lands. The reservation in said agreement of a further opportunity to bid in the event there were bids beyond $35,000 is suggestive but since regulations were not then issued and there was some uncertainty as to what they would contain, there could have been a misapprehension concerning the propriety of said contracts. As to Elizabeth C. Bumgarner the evidence is clearly insufficient to show that she was not acting in good faith; and in any event, the court does not believe as to either that a wrongful intent or related fraud is shown with respect to said initial transactions by clear or convincing evidence. The agreement of November 11, 1960, rendered it clear and convincing that Parley Probst then intended to obtain title to said lands without complying with Title 25, U.S.C. Sections 677i and 677n and said regulations issued by the Secretary of the Interior pursuant thereto, and the covenant running with said lands as contained in the deed to Elizabeth C. Bumgarner, and at least from that time forward it is established by clear and convincing evidence that he was not proceeding in good faith and that he did intend not only in violation of any possible rights of the plaintiff or its members but in violation of Elizabeth C. Bumgarner's

rights to utilize his designed contract with the latter to circumvent the controlling statute and regulations. Elizabeth C. Bumgarner was not in pari delicto in connection with the November 11, 1960, contract, or at all for the reasons herein above indicated.

29. The obtaining of the conveyance by administratrix's deed from defendant Oranna B. Moosman to defendant Parley Probst after the death of Elizabeth C. Bumgarner was an act perpetrated by said Parley Probst with fraudulent intent to further avoid the provisions of 25 U.S.C. 677i, 677n, 25 C.F.R. Part 243 and the covenant running with said lands.

30. The lands, the subject of this litigation, were never offered to the Ute Indian Tribe or to its members by Elizabeth C. Bumgarner or by anyone on her behalf.

31. Plaintiff and its constituent members and others have been denied opportunity to purchase said lands from Elizabeth C. Bumgarner or her estate at the price they were offered to defendant Parley Probst after said Elizabeth C. Bumgarner had determined to dispose of said lands, by reason of said scheme, artifice and design and the otherwise unlawful acts of defendant Parley Probst.

32. In the summer of 1966, Plaintiff by and through its employees and agents and the Administratrix of the Elizabeth C. Bumgarner Estate first discovered the fraudulent scheme, artifice and design employed by defendant Parley Probst in connection with his contracts and relations with Elizabeth C. Bumgarner to prevent plaintiff or others from having an opportunity to pur-

chase said property as provided by law, and could not by reasonable diligence and inquiry have sooner discovered said unlawful scheme, artifice and design.

33. Purchases of tribal assets of mixed-blood members by the Ute Indian Tribe of the Uintah and Ouray Reservation for and on behalf of its members and such purchases pursuant to offers required by the provisions of Title 25 U.S.C. 677n have been approved and sanctioned by the Secretary of the Interior by regulations providing therefor and by a course of practice extending from October 14, 1960, to and including April 8, 1964.

34. The final roll of full-blooded members and mixed-blooded members of the Tribe was approved by the Secretary of the Interior on March 27, 1956, and published in the Federal Register on April 5, 1956, (21 F.R. 66).

35. Parley Probst has had possession and use of said lands since October 28, 1959, and has received all the rents, government benefits and profits therefrom. Such rents, benefits, profits and income are sufficient to reasonably compensate him for interest on said $35,000 after November 11, 1960, and for taxes paid and improvements made to said property while in his possession; and in any event it would be equitably unjustified to allow him any relief or benefit by reason of his illegal plan and artifice aforesaid except such possession to date and a return of said $35,000, together with interest on the sum of $33,516 from October 28, 1959, to November 11, 1960 at the rate of six per cent per annum.

From the foregoing Findings of Fact, the Court now makes and enters the following:

CONCLUSIONS OF LAW

1. The Court has jurisdiction over the subject matter of this action and the persons of the parties.

2. This action arises under the Act of August 27, 1954, 68 Stat. 868; U.S.C., Title 25, Section 677 *et seq.*

3. The jurisdiction of this Court is conferred by the Act of October 10, 1966, 80 Stat. 880, U.S.C., Title 28, Section 1362.

4. Elizabeth C. Bumgarner was not precluded by any statute, regulation or principle of law from borrowing money for the purpose of her acquisition of the title to the property in question. As of October 28, 1959, when she contracted with Parley Probst for his acquisition of said property through her, but subject to posting as required by law, there is no absolute rule prohibiting Elizabeth C. Bumgarner from reaching a determination to sell subject to posting as provided by law and regulation and the other requirements of law. It seems to the Court that to say that before a determination to sell could even be formed in the mind of an Indian, a agreement would have to be submitted to the Secretary and the requirements of law otherwise fully complied with would be unrealistic and I would interpret the requirements as authorizing tentative agreements but subject to the posting and other requirements of law before they could be deemed finally consummated. At least there is uncertainty on the question of timing in this respect which has led me to believe that if the basic framework of the October agreement and mortgage was illegal, at least there was enough uncertainty existing at that time to raise question as to any bad intent on the part of Probst and to make it appear that there was not shown

any bad intent on the part of Elizabeth C. Bumgarner in entering into the initial transactions, and, indeed, that the initial transaction may not have been void from the beginning, had posting and opportunity to bid been accomplished pursuant to the statute and regulations within a reasonable time. On the other hand, the provision included by Probst in the initial contract, attempting to protect his right to acquire the property in spite of higher bids by members of the Tribe, throw into question the validity of the contract from the beginning as far as Probst is concerned.

5. But whether the contract of October 1959 is considered merely voidable or absolutely void in view of the statutes and regulations is immaterial insofar as the proper solution of this case is concerned: If void from the beginning not only would Probst not be able to base any rights thereon but the Tribe would not necessarily have rights predicated thereon, unless Elizabeth C. Bumgarner and Probst were so far in pari delicto as to necessitate on equitable principles a reconstruction of some right on the part of members of the Tribe to avoid unjust enrichment on the part of her Administratrix and Probst, or other inequitable or unconscionable result. If the initial contract were not necessarily void, it is clear that the amendment of November 11, 1960 rendered it illegal and void as of that time and we are still confronted with the problem of whether Elizabeth C. Bumgarner and Probst were in pari delicto with reference to the latter contract or in view of other developments.

6. Even though a solution of this case in accordance with legal and equitable requirements and principles de-

pended upon a recognition of the rights of plaintiff as distinguished from the claims of either the Administratrix or Probst, the Court would be confronted with difficult if not insurmountable problems: As indicated in the Findings, and as I am convinced, Mrs. Bumgarner was more used than using, more imposed upon than imposing. Probst managed whatever plans there were for voidance of the statute and the regulations and obtained an illegal advantage over Mrs. Bumgarner herself in precluding higher bidding for the property when he learned that others might cause it to be bid up. The plaintiff Tribe would have the benefit of the price thus set and maintained by what they now claim to be the fraud of Probst and Bumgarner but which I believe was primarily the fault of Probst. It is impossible to have a bidding now because of the great change in conditions. What the result of a posting of the property would have been at the time cannot be reconstructed except by sheer speculation. The plaintiff had no absolute right to purchase the property at a fixed price.

7. Even though there were an appropriate way for me to place the Tribe now in the position of Probst with reference to the purchase price of the property and permit it to acquire the property for such purchase price, it is my opinion nonetheless that as between the Tribe and the successors in interest of Elizabeth C. Bumgarner the latter has superior rights and is entitled to the property. It is obvious that neither equity nor law permits Probst to retain the property.

8. The deed of the Administratrix to Parley Probst was obtained contrary to the provisions of Title 25 U.S.C. 677f and 677n notwithstanding the fact that th

final conveyance occurred after August 27, 1964, the delay in conveyance having been occasioned as a result of the scheme, artifice and design of said Parley Probst to evade the provisions of said law.

9. The defendants Parley Probst and Elizabeth C. Bumgarner were not in pari delicto with respect to any scheme, artifice and design, or any other act or agreements to circumvent the provisions of 25 U.S.C. 677 *et seq.* and the rules and regulations issued pursuant thereto.

10. The relative positions of Probst and Elizabeth C. Bumgarner during all times and under all circumstances material herein were so disparate and shockingly unequal as to prevent equity from tolerating the idea that Probst could use his power and influence over Elizabeth C. Bumgarner, which was illegal and contrary to public policy, and then invoke principles of equity and law to enable him to retain that which he had obtained through his artifices and superior position. ***CF.*** Herrick v. Lynch, et al., 150 Ill. 283, 37 N.E. 221. Nor do principles of equity preclude the Administratrix from recovering the property as against the claims of the plaintiff on the ground that Elizabeth Bumgarner was in pari delicto with Probst, or could not come into court with clean hands. It seems to me that if at any time before the death of Mrs. Bumgarner she had taken the position that her dealings with Probst were void and of no effect, or were voidable on her part, she would have been under no obligation to convey to Probst or to surrender the property to the plaintiff Tribe at the price she had agreed to pay Probst. Her death did not weaken that position even though we assume that the Administratrix

would be in no better position than she would have been in. In view of the unequal position of the parties, and the failure of any clear and convincing proof, or indeed any substantial proof that Mrs. Bumgarner realized the implications of the various contracts, her heirs should not be deprived of the property any more than she should have been. The regulations providing for posting of the property were as much or more for the protection of the Indian owner as for the protection of the members of the Tribe who might bid upon the property. In view of the history of the Indians and their relationship with the government, there was and is a strong public policy in favor of the Indian owner in the position of Mrs. Bumgarner, and such public policy under federal law will not permit the court to readily reject her rights under the doctrine of pari delicto. *Cf.* Perma Mufflers v. International Parts Corporation, 392 U.S. 134 (1968).

11. State law is not incompatible with principles of federal law. Equality of culpability was held to be not present in Schvaneveldt v. Noy-Burn Milling and Processing Corp., 10 Utah 2d 1, 347 P.2d 553, even though the plaintiff had participated to some degree in activities found to be unlawful. There was no mechanical application of the doctrine to the exclusion of the question of relative culpability. In considering a related doctrine, that of clean hands, the Utah court also has similarly rejected a mechanical application of the rule, particularly where any wrongs participated in by a claimant did not injure the other party. See Park v. Jameson, 12 Utah 2d 141, 364 P.2d 1. In the case at bar the plaintiff Tribe suggests injury by being deprived of the opportunity of acquiring the property for $35,000. It is specu-

lative because of the impossibility of reconstructing what would have happened should the property have been posted that the Tribe would have acquired the property at all and certainly it is speculative that it would have acquired it for $35,000. But in view of the increase in value of the property and the rights of the estate which need not be premised upon mere speculation, the award of the land to the administratrix is supportable both by the evidence and the law as the court views it.

12. The rights of the administratrix to the property are not barred by any state or federal statute of limitations nor by any laches or estoppel.

13. That by decree of this court Parley Probst should be directed to execute a good and sufficient conveyance of said real property free from encumbrance and to deliver the same forthwith to the said administratrix in return for the payment of the sum of $35,000, together with interest on $33,516 from October 28, 1959, to November 14, 1960; providing that if said conveyance is not so delivered Parley Probst shall be divested of the title of said property and that the title shall vest in said administratrix by operation of said decree. Taxable costs should be awarded against Parley Probst.

14. Counsel for the administratrix is directed to prepare, serve and lodge with the court within ten days a proposed form of judgment which if not approved as to form by the other parties will be settled by the court on its next rule day.

Dated this 9th day of December, 1968.

A. Sherman Christensen
UNITED STATES DISTRICT JUDGE

Appendix No. III

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

MARCH TERM, 1970

UTE INDIAN TRIBE OF THE UINTAH AND OURAY RESERVATION, a body politic and corporate of the United States of America,

Plaintiff-Appellant,

vs.

PARLEY PROBST and ORANNA B. MOOSMAN, Administratrix of the Estate of Elizabeth C. Bumgarner Poowegup, Deceased,

Defendants-Appellees.

No. 125-69

UTE INDIAN TRIBE OF THE UINTAH AND OURAY RESERVATION, a body politic and corporate of the United States of America,

Plaintiff-Appellee,

vs.

PARLEY PROBST,

Defendant-Appellant,

and ORANNA B. MOOSMAN, Administratrix of the Estate of Elizabeth C. Bumgarner Poowegup, Deceased,

Defendant-Appellee.

No. 126-69

Appeal from the United States District Court for the District of Utah, Central Division
(D. C. No. C 172-67, Civil)

John S. Boyden (Stephen G. Boyden on the brief) for Ute Indian Tribe, Appellant in No. 125-69 and Appellee in No. 126-69.

Wayne L. Black (Robert D. Moore on the brief) for Parley Probst, Appellee in No. 125-69 and Appellant in No. 126-69.

James J. Smedley (David Sam on the brief) for Oranna B. Moosman, Appellee in both Nos. 125-69 and 126-69.

Before MURRAH, Chief Judge, and BREITENSTEIN and HICKEY, Circuit Judges.

BREITENSTEIN, Circuit Judge.

We have here a three-way fight over Indian land. Plaintiff-appellant Ute Indian Tribe sued for certain equitable relief and for cancellation of a deed given by defendant-appellee Oranna Moosman as administratrix of the estate of Elizabeth Bumgarner Poowegup to defendant-appellant Parley Probst. Jurisdiction lies under 28 U.S.C. § 1362 because the matter in controversy arises under the Act of August 27, 1954, 25 U.S.C. § 677 et seq. The answer of Probst asserts the validity of the deed and counterclaims for damages. The administratrix denies that the Tribe has any right to the land and, by way of cross-claim against Probst, asserts that the deed to

him is void. The district court held that the administratrix was entitled to the land. Both the Tribe and Probst appeal.

The Act provides for the division of the assets of the Tribe between the full-blood and mixed-blood groups, the termination of federal supervision over the latter, and the development of a program for such termination over the former. After the division of the assets between the two groups, the mixed-bloods were to devise a plan for the distribution of its assets among its members. 25 U.S.C. § 677(L). If a majority of the mixed-blood group decided that partition of any land was impracticable and, if the Secretary of the Interior approved, the land could be sold and the proceeds divided among members of the group. 25 U.S.C. § 677 [L] (5). Before the termination of federal supervision, a mixed-blood could dispose of his interest in acquired tribal property only with the approval of the Secretary. See 25 U.S.C. § 677n and 25 CFR § 243.3 (1966 ed.).[1] *Federal supervision over tribal land terminated when a patent issued thereto.* 25 CFR § 243.2(h). Until August 27, 1964, a patent conveying any tribal land to a mixed-blood had to provide that until that date members of the

---

[1]Section 677n provides:

"Any member of the mixed-blood group may dispose of his interest in the tribal assets prior to termination of Federal supervision, subject to the approval of the Secretary. In the event a member of the mixed-blood group determines to dispose of his interest in any of said real property at any time within ten years from August 27, 1954, he shall first offer it to the members of the tribe, and no sale of any interest, prior to termination of Federal supervision, shall be authorized without such offer to said members of the tribe in such form as may be approved by the Secretary. After termination of Federal supervision the requirement of such offer, in form to be approved by the Secretary, shall be a covenant to run with the land for said ten-year period, and shall be expressly provided in any patent or deed issued prior to the expiration of said period."

Tribe had the right of first refusal of an offer to sell, 25 U.S.C. § 677n and 25 CFR § 243.4.

In the division between the groups, the mixed-bloods received the 3,200 acres of land in question. They decided that partition was impracticable and that the land should be sold. It was appraised at $26,600. Secretarial approval is conceded.

Elizabeth, a mixed-blood, submitted the high bid of $26,016 for the land. She did not have the necessary money and interested Probst, a non-Indian, in the land. A written contract was prepared and executed on October 28, 1959, whereby Elizabeth sold to Probst for $35,000 and Probst went into immediate possession. The contract recognized that no patent had been issued and that Elizabeth would have to comply with the first-refusal provision of the statute. Elizabeth gave Probst a $35,000 mortgage on the land to assure compliance with the contract terms. The mortgage was duly recorded. Neither the contract nor the mortgage was submitted to the Secretary for his approval.

On August 11, 1960, the Secretary promulgated regulations as authorized by the Act. 25 U.S.C. § 677z. See 25 CFR §§ 243.1-243.12 (1966 ed.). A patent was issued to Elizabeth on September 20, 1960. It contained the first-refusal provisions required by the statute and regulations. On November 11, 1960, Elizabeth and Probst executed an amendment to the October 28, 1959, contract. It provided that certain escrowed funds be released to Elizabeth; that the required offering should not be made "until such time as the Party of the First Part [Probst] requests that the same be made"; and that

if such offering was made at Probst's request certain conditions for his protection should be included within the offer.

Elizabeth was killed in an accident on November 27, 1963, without making the offer and without conveying to Probst. Oranna was appointed administratrix of Elizabeth's estate. Probst filed a creditor's claim against the estate on the basis of the 1959 sale contract and mortgage. Pursuant to court order, the administratrix conveyed the land to Probst by a September 21, 1964, deed which was recorded on October 5, 1964. The pending suit was brought by the Tribe on September 20, 1967.

The trial court held that Probst was guilty of fraud; that Elizabeth was not in pari delicto; that the first-refusal provisions "were as much or more for the protection of the Indian owner as for the protection of the members of the Tribe"; that public policy favored the Indian owner; that the impossibility of reconstructing what would have occurred had there been a offering by Elizabeth and the increase in value of the property supported the award of the land to the administratrix; and that she was not barred by any statute of limitations, by laches, or by estoppel.

The construction and application of § 677n is decisive. The land was a tribal asset. It was real property as that term is used in the section because it was acquired by a mixed-blood. See definition of "real property" in 25 CFR § 243.2(g). The patent to Elizabeth contained the first-refusal provision. Neither she nor her administratrix made the required offer. The question is the effect of such non-action.

The arguments of the parties lead us into many by-paths which need not be traveled. The Act was intended to distribute tribal property and terminate federal supervision over the mixed-bloods. See § 677 and House Report No. 2493, 2 U.S.Cong. News '54 3353-3359. We are aware of no legislative history which illuminates the intent of the first-refusal provisions. The reliance of the Tribe and the administratrix on the provision of § 677i that a contract made in violation of that section shall be null and void is misplaced. As we read that section it applies to undivided interests and not to real property which a mixed-blood has acquired by purchase. Our concern is whether the statute confers upon the Tribe the unconditional right to meet the price at which the selling mixed-blood offers land acquired from tribal assets.

Contrary to the trial court, we believe that Congress, by incorporating § 677n into the Act, had in mind primarily the protection of the Tribe and only secondarily, if at all, the protection of the selling mixed-blood. The first-refusal provision gave the Tribe, for a ten-year period, the opportunity to recover land which it had lost by the division of assets between the two groups. The language of § 677n means that Congress believed it preferable that tribal land acquired by a mixed-blood, who determined to sell before 1964, return to the Tribe if the Tribe wanted it and could match the offering price. This procedure does not assure a higher price to the mixed-blood, because the Tribe is required only to meet the offering price. Only in the event two or more members of the Tribe compete for acquisition of the land does bidding take place. 25 CFR § 243.7.

The statute must be construed and applied to ef-

fectuate the congressional intent. United States v. American Trucking Associations, Inc., 310 U.S. 534, 542; see also Federal Trade Commission v. Fred Meyer, Inc., 390 U.S. 341, 348-352. We believe that when a mixed-blood determined within the ten-year period to dispose of his acquired interest, the Tribe had the right to have the property offered to it in accordance with the statute and regulations. *Elizabeth determined to sell the land at or before the time when she entered into the first contract with Probst.* She did not offer the land to the Tribe. *Her administratrix in turn did not offer it, but instead waited until the expiration of the ten-year period and then gave Probst a deed.* The Tribe was thus deprived of its statutory right. It makes no difference whether this result was intentional or unintentional or whether it was the upshot of a fraudulent scheme, good-faith ignorance, or ineptness. Whatever the reason, the inescapable fact is that the Tribe was not given the opportunity to reacquire the land.

Probst argues that the assertion of this right is barred by the Utah statute of limitations, Utah Code Ann. 1953, § 78-12-26(3), which provides that a fraud action must be brought within three years after the discovery by the aggrieved party of the fraudulent act. Holmberg v. Armbrecht, 327 U.S. 392, 395-397, holds that a suit in a federal court to enforce in equity a federally created right is not controlled by the forum statute of limitations. The Tribe seeks in federal court equitable relief from the denial of a federal statutory right. There is no applicable federal statute of limitations. Under Holmberg the state statute *does not apply* and the question is whether the Tribe is chargeable with laches.

The essence of the defense of laches is prejudice to a defendant through unconscionable delay by a plaintiff in the assertion of his claim. Costello v. United States, 365 U.S. 265, 282, and Potash Co. of America v. International Minerals & Chemical Corp., 10 Cir., 213 F.2d 133, 134. Unconscionable delay can occur only after a party discovers, or by the exercise of reasonable diligence could have discovered, the wrong of which he complains. Here the wrong was the denial to the Tribe of its right of first refusal. To sustain his claim of knowledge on the part of the Tribe, Probst relies on November 18, 1959, minutes of a tribal meeting stating that Elizabeth was contemplating the sale of the land, the recording of the mortgage, the payment by Probst of taxes on the land, a 1960 telephone call between the lawyers for the Tribe and Probst, a conversation after Elizabeth's death among Probst, his lawyer, and a tribe official, and the records of the Bureau of Indian Affairs showing that Probst advanced the purchase price to Elizabeth. These facts, considered separately or together, do not show any action by Probst or Elizabeth to deny to the Tribe its statutory right of first refusal. The denial of that right first occurred in the November 11, 1960, amendment to the October 28, 1959, sale agreement. In that document Elizabeth agreed not to offer the land to the Tribe without a request from Probst. The Tribe did not have knowledge of the amendment until the summer of 1966. Even if the Tribe is charged with constructive notice of the recorded deed from the administratrix to Probst, we believe that the delay of less than three years in the institution of the suit was not unconscionable. In any event, Probst has shown no prejudice resulting from the delay. He has been in possession of the land since

1959 and has enjoyed the benefits of its use. In our opinion laches is no bar to the claim of the Tribe.

The question remains of what relief the court should fashion to remedy the wrong. When federally secured rights are invaded, federal courts must adjust their remedies to grant appropriate relief. J. I. Case Co. v. Borak, 377 U.S. 426, 433; see also Jones v. Alfred H. Mayer Co., 392 U.S. 409, 414, n. 13. It is impossible to reconstruct what would have occurred if Elizabeth had made the required offering. In addition, the ten-year period fixed by the statute has passed.

To do equity a decree should put the parties in the position where they would have been if the required offer had been made. From our review of the record we are convinced that this should be done without regard to all the charges and countercharges of fraud, misconduct, and bad faith. When everything else is put aside, the fact remains that Probst, Elizabeth, and the administratrix by their actions deprived the Tribe of a federally created right and that right must be vindicated by affording the Tribe an apportunity to acquire the land.

The administratrix points out that the offer required by § 677n must be made "to the members of the tribe" and argues that the Tribe itself may not be the purchaser of the land. We are not persuaded. Under the regulations, 25 CFR § 243.6, the superintendent was required to notify the Tribe of any offers to sell. As found by the trial court in an unchallenged finding of fact, *the Tribe had on occasion purchased property offered by mixed-bloods between 1960 and 1964 and these purchases had been approved by the Secretary.* Two

letters from Assistant Secretaries of the Interior state that the offering required by the Act ran to the Tribe as well as to its members. Construction of an act by the agency charged with its administration should be followed unless there are compelling indications that it is wrong. Red Lion Broadcasting Co., Inc. v. Federal Communications Commission, 395 U.S. 367, 381. Here there are no such indications. What the members of the Tribe can do individually they can do collectively as a tribe.

The administratrix argues that to permit the Tribe to purchase will deprive her of the advantage which might be secured through competitive bidding. The argument comes too late. If either she or Elizabeth desired competitive bidding, they each had time to make the offer which the statute requires; and they chose not to do so. In any event, the first-refusal provision is primarily for the benefit of the Tribe and its full-blood members and only incidently for the benefit of the selling mixed-blood. We see no reason why the Tribe should not have an apportunity to buy the land without putting it up for bidding.

A decree should be entered permitting the Tribe to purchase the land within a reasonable time by the payment to Probst of his purchase price, $35,000, plus interest thereon from October 28, 1959, to November 11, 1960. We cut off the interest on the latter date because then Probst and Elizabeth made the amendment to the contract which circumvented the statute. The payment by Probst of taxes on the land and the minor improvements which he made thereon are set off by the fact that he has had the use of the land for over ten years. The

decree should make appropriate provisions for investiture of title to the land in the Tribe upon the payment by it of the required amount to Probst.

Reversed and remanded for further proceedings consistent with this opinion.

Appendix No. IV

Nos. 125-69 and 126-69 — UTE INDIAN TRIBE v. PROBST, et al.

ON REHEARING

PER CURIAM.

We have before us the separate petitions of appellee Oramna Moosman and appellee Probst for rehearing.

Oramna asserts that the Termination Act, 25 U.S.C. 677 et seq., as construed and applied is unconstitutional because it denies due process to the mixed-bloods in that the enforcement of the first-refusal right of the Tribe arbitrarily and capriciously discriminates against the mixed-blood group. The theory appears to be that, because of the economic situation of the mixed-bloods and because of their continuing need for federal supervision, the protective provisions of the Act are for their benefit and the use of those provisions for the benefit of the Tribe is an unreasonable classification which denies equal protection.

The record contains no evidence of their economic condition or need for continued supervision. The legislative history shows that the mixed-bloods desired termination of federal supervision. This appears in the following excerpt from House Report No. 2493, 83rd Cong. 2d Sess., 2 U.S.Cong. News '54, 3355, 3356:

> "The action proposed by this bill will permit the mixedbloods to progress toward termination of Federal supervision without being held back by the fullbloods who desire continuation of

> wardship status. According to testimony from members of the Ute Tribe, the majority of the mixedblood group feel that they are ready for a termination of Federal supervision over their property and the fullblood Indians believe that they are not ready for such action.

Although the Fifth Amendment does not contain an equal protection clause as does the Fourteenth Amendment, which applies to the states, discrimination may be so unjustifiable as to violate due process. Bolling v. Sharpe, 347 U.S. 497, 499. In the case at bar the classification into the two groups was supported by the Indians, was relevant to the purposes of the legislation, and had a reasonable basis. We find no arbitrary or capricious discrimination which violates Fifth Amendment due process. See Detroit Bank v. United States, 317 U.S. 329, 337-338.

Oranna says that the action of the court usurps the power of the Secretary to approve the sale and that, because the Secretary never approved the sale, the deed to Probst is ineffective. Probst argues that his deed is good because it was executed after the expiration of the ten-year period during which the Tribe has the first-refusal right. The facts are that no one asked for the approval of the Secretary and that the machinations of Probst, Elizabeth, and Oranna delayed the execution of the deed until after the ten-year period. Elizabeth determined to sell to Probst in October, 1959, and made a $9,000 profit on the sale. We are concerned with the rights of the Tribe. The failure of Probst, Elizabeth, and Oranna to seek the approval of the Secretary and to offer the land to the Tribe cannot defeat the right of the Tribe.

Probst argues for the first time that the first-refusal

provision of § 677n applies only to distributive shares and not to purchased property. The land was a tribal asset which was acquired through purchase by Elizabeth in accordance with § 677[L](5). Section 677n permits a mixedblood to dispose of his interest in tribal assets before termination of federal supervision on the condition that the Secretary approve. The section goes on to say that if a mixed-blood determines to dispose of his interest "in any of said real property" within the ten-year period he shall first offer it to the Tribe and that the requirement of such offer shall be a covenant to run with the land and shall be expressly provided in any patent issued before the expiration of that period. The regulations, 25 CFR § 243.2(g), define real property to mean "any interest in land set apart to the mixed-blood group and thereafter acquired by mixedblood members under the terms of the Act, * * *." We believe that the intent of § 677n was to make the first-refusal right apply to both distributive shares and to purchased tribal land. The Secretary so construed it both in the regulation and in the patent issued to Elizabeth. In our opinion the administrative construction is correct and should be followed. See Red Lion Broadcasting Co., Inc. v. Federal Communications Commission, 395 U.S. 367, 381.

The reliance of Probst on laches is misplaced. The analogous, but inapplicable, Utah statute of limitations is three years. As we have heretofore pointed out, the events which gave the Tribe notice of the conveyance without the required offer occurred within three years before the suit was brought. In the circumstances, the burden is on the defendant to show extraordinary circumstances which require the application of the doctrine

of laches. Shell v. Strong, 10 Cir., 151 F.2d 909, 911. Probst made no such showing.

The petitions for rehearing are severally denied.

Appendix No. V

AGREEMENT

THIS AGREEMENT made and entered into at Roosevelt, Duchesne County, State of Utah this 28th day of October, 1959 by and between PARLEY PROBST of Heber, Wasatch County, Utah, party of the first part, and ELIZABETH C. BUMGARNER of Ft. Duchesne, Uintah County, Utah, party of the second part,

WITNESSETH:

WHEREAS, party of the second part is the successful bidder for the property described hereinbelow at a bid conducted by the Affiliated Ute Citizens of Utah, and is entitled pursuant to said bid to secure title to said property, and

WHEREAS, party of the second part desires to sell said property to party of the first part for Thirty Five Thousand Dollars ($35,000.00) and,

WHEREAS, the steps described hereinbelow will have to be followed in order for her to obtain marketable title to said property, and

WHEREAS, party of the first part desires to be assured that he will receive either marketable title or the refund of all funds advanced by him,

NOW THEREFORE, in consideration of the mutual covenants and promises hereinbelow contained the parties agree as follows:

1. Party of the second part agrees to sell, and party of the first part agrees to purchase the following described real property situated in Wasatch County, State of Utah, to-wit:

> Sections 13, 14, 23, 24 and 26 in Township 4 South, Range 11 West, USB & M, containing 3200 acres, more or less. Subject to reservation in the United States of all minerals and mineral rights.
>
> Including all water rights and other appurtenances thereto.

2. Party of the second part warrants and promises to obtain a patent from the United States of America to said property pursuant to procedure of Public Law 671 of the 83 Congress, 2nd Session by specifically taking the following steps:

(a) Party of the second part agrees to apply Twenty Six Thousand Sixteen Dollars ($26,016.00) Dollars, receipt from the party of the first part, which she duly acknowledges herein, to the purchase of said land pursuant to her bid therefor with the Affiliated Ute Citizens of Utah, Ft. Duchesne, Utah.

(b) Party of the second part further agrees that as soon as regulations are formulated by the Secretary of the Interior, she will offer this tract to the members of the Ute Indian Tribe, pursuant to Section 15 of Public Law 671 aforesaid, and

(c) Upon the failure of anyone to bid on said land, she will then convey said tract by warranty deed to party of the first part.

(3) Party of the first part agrees to pay for said

land the sum of Twenty Six Thousand Sixteen Dollars ($26,016.00) receipt of which is hereby acknowledged by placing the same in escrow with the Realty Office at the Uintah Ouray Indian Agency at Ft. Duchesne, Utah for the purpose of payment on second party's bid on said land; Seventy Five Hundred Dollars ($7500.00) cash; receipt of which is hereby acknowledged, and Fourteen Hundred Eighty Four Dollars ($1484.00) receipt of which is hereby acknowledged to be placed in escrow with Mr. R. Earl Dillman, Attorney at Law, Roosevelt, Utah to be paid to party of the second part upon full compliance by her with the offering procedure referred to hereinabove and execution by her of a warranty deed to said property conveying marketable title to party of the first part, accompanied by patent from the United States of America conveying marketable title to the party of the second part, or a certified copy thereof.

4. Party of the second part agrees that in the event that a bid in excess of Thirty Five Thousand ($35,000.00) Dollars, cash, is made for said property at the offering required hereinabove, that she will do the following:

(a) Notify party of the first part and permit him to make a higher bid if he wishes.

(b) If he does not so wish, to repay to him all monies which he has advanced, together with interest thereon at the rate of six (6%) per cent per annum, for the period in which she would have had said funds.

(f) Party of the second part further agrees to execute a real estate mortgage on said property to

party of the first part, creating a lien on said land to secure re-payment to party of the first part of the funds so advanced in the event that she is unable to perform said contract or violates any provision of this agreement.

5. Party of the first part is entitled to immediate possession of said tract.

IN WITNESS WHEREOF, parties have executed this agreement intriplicate the day and year first above written.

(s) Parley Probst
Party of the First Part

(s) Elizabeth C. Bumgarner
Party of the Second Part

STATE OF UTAH)
County of Duchesne) ss.

On the 28th day of October, A.D. 1959, personally appeared before me Parley Probst and Elizabeth C. Bumgarner, the signers of the foregoing instrument, who duly acknowledged to me that they executed the same.

(s) R. Earl Dillman
Notary Public
Roosevelt, Utah

Appendix No. VI

AGREEMENT

This Agreement made and entered into at Fort Duchesne, Uintah County, State of Utah, this 11th day of November, 1960, by and between PARLEY PROBST of Heber, Wasatch County, Utah, PARTY OF THE FIRST PART and ELIZABETH C. BUMGARNER of Fort Duchesne, Uintah County, Utah PARTY OF THE SECOND PART.

WITNESSETH:

WHEREAS, the parties have heretofore entered into an Agreement dated October 28, 1959 for the sale of the following described real property situated in Wasatch County, State of Utah, to-wit:

> Sections 13, 14, 23, 24 and 26 in Township 4 South, Range 11 West, USB & M, containing 3200 acres, more or less. Subject to reservation in the United States of all minerals and mineral rights.
>
> Including all water rights and other appurtenances thereto.

and,

WHEREAS, under the terms of said Agreement R. Earl Dillman, Attorney at Law of Roosevelt, Utah, is holding a check from the Party of the First Part to the Party of the Second Part in the amount of One Thousand Four Hundred Eighty Four Dollars ($1,484.00) as escrow, and

WHEREAS, the parties desire to amend said

Agreement only in the respects stated hereinbelow and further desire that this Agreement shall become a part of said Agreement and the terms hereof shall be read as amendatory to said Agreement.

NOW, THEREFORE, in consideration of the mutual covenants and promises hereinbelow contained the parties hereby agree as follows:

(1) Party of the First Part agrees that the escrow may turn the above mentioned check for One Thousand Four Hundred Eighty Four Dollars ($1,484.00) over to the Party of the Second Part even though the conditions originally stated in the contract as a prerequisite to such delivery have not yet been performed.

(2) Parties agree that the offering of said property pursuant to Section 15 of Public Law 671, as set forth in paragraph 2b of the original agreement between the parties shall not be made until such time as the Party of the First Part requests that the same be made.

(3) Party of the Second Part agrees that in the event that Party of the First Part requests that said offering be made, that she will do so with the provision in her offering that she may reject any and all offers made to her, and that in making said offer she will stipulate that the sum to be paid therefor must be an amount equivalent to Thirty Five Thousand Dollars ($35,000.00) plus an amount equivalent to interest at the rate of Six Per Cent (6%) per annum on Thirty Five Thousand Dollars ($35,000.00) computed from October 28, 1959, and that furthermore, she will reject any offer equal to that amount or higher. Parties further agree that that certain real estate mortgage between the

parties dated October 28, 1959, and the lien thereof shall extend to the provisions of this agreement.

IN WITNESS WHEREOF, parties have executed this Agreement the day and year first above written.

(s) Parley Probst
(s) Elizabeth C. Bumgarner

STATE OF UTAH)
COUNTY OF WASATCH) ss.

On the 11th day of November, A.D. 1960, personally appeared before me PARLEY PROBST, the signer of the within instrument who duly acknewledged to me that he executed the same.

(Unintelligible)
Notary Public

STATE OF UTAH)
COUNTY OF UINTAH) ss.

On the 11th day of November, A.D. 1960, personally appeared before me ELIZABETH C. BUMGARNER, the signer of the within instrument who duly acknowledged to me that she executed the same.

(s) R. Earl Dillman
Notary Public

Appendix No. VII

Oct. 29, 1959

Recorded at Request of Glen M. Hatch Oct. 29, 1959 at 10 A.M. Fee Paid $4.00 Wayne G. Whiting by Mary G. Chipman. Dep. Book .... Page 50 Ref.:.... Mail tax notice to ..... Address .....

MORTGAGE

ELIZABETH C. BUMGARNER, a female mortgagor of FT. DUCHESNE, County of UINTAH, State of Utah, hereby MORTGAGE to PARLEY PROBST of HEBER, WASATCH COUNTY, UTAH for the sum of THIRTY FIVE THOUSAND DOLLARS, the following described tract of land in WASATCH County, State of Utah:

> Sections 13, 14, 23, 24 and 26 in Township 4 South, Range II West, USB & M, containing 3200 acres, more or less. Subject to reservation in the United States of all minerals and mineral rights, but including all water rights and other appurtenances thereto.

This mortgage is given to secure the following Obligations: A contract between the parties of even date herewith, and performance of the terms thereof which require, among other things, re-payment of Thirty Five Thousand Dollars, in the event of a failure of mortgagor to perform the provisions thereof.

The mortgagor agrees a reasonable attorney's fee in case of foreclosure.

WITNESS the hand of said mortgagor, this 28th day of October, A.D. nineteen hundred and fifty nine.

(s) Elizabeth C. Bumgarner

Signed in the Presence of
R. Earl Dillman

STATE OF UTAH
County of Duchesne

On the 28th day of October, A.D. 1959 personally appeared before me Elizabeth C. Bumgarner, a female the signer of the within instrument, who duly acknowledged to me that she executed the same.

(s) R. Earl Dillman
Notary Public

My commission expires January 22, 1962.
Residing in Roosevelt, Utah

Appendix No. VIII

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT IN AND FOR DUCHESNE COUNTY, STATE OF UTAH CREDITOR'S CLAIM

In the matter of the Estate of

ELIZABETH BAUMGARNER POOWEGUP,
Deceased,

Estate of

ELIZABETH BAUMGARNER POOWEGUP,
Deceased.

TO: ORANNA B. MOOSMAN,
ADMINISTRATRIX, Dr.

Decedent during her lifetime entered into the Agreement and Mortgage; copies of which are hereunto attached and incorporated herein by reference. Pursuant to the Agreement and Federal Law, decedent, of her estate, can convey title to Claimant only by offering the land in question to the members of the full-blood or mixed-blood groups of the Ute Indian Tribe of the Uintah and Ouray Reservation. That after August 27, 1964, said Estate can convey the tract described in the Agreement and Mortgage without such offering. This claim is made to enforce the provisions of the attached Agreement and for this purpose to demand in the alternative the following:

(a) That the land be offered in accordance with the agreement and Federal law, and in the event that

the same is not sold pursuant to such offering, that the same be forthwith conveyed to Claimant. If bids are made at the time of the offering Claimant demands the rights assured him under the contract to buy the same at a higher figure than the bid.

(b) In the event that the same is not offered by the Administratrix prior to August 27, 1964, that the same be forthwith conveyed to Claimant.

(c) In the event of the failure of the Administratrix to convey the tract to the Claimant, or in the event of the failure of the Claimant to obtain title to said tract pursuant to proceedings in specific performance, then Claimant claims under the agreement and mortgage and his right to foreclosure thereof, the sum of Thirty-Five Thousand Dollars ($35,000.00), together with interest at the rate of six (6) per cent per annum from the date of October 28, 1959, and furthermore for damages for breach of contract, loss of the benefits of his bargain and for improvements to the premises in the additional amount of Thirty-five Thousand Dollars ($35,000,00).

STATE OF UTAH)
COUNTY OF) ss.

Parley Probst, whose claim is herewith presented to the Administratrix, Oranna B. Moosman, of the estate of Elizabeth Bumgarner Poowegup, deceased, being first duly sworn, on his oath says that the amount thereof, is justly due to said Claimant, that no payments have been made thereon which are not credited and that

there are no offsets to the same to the knowledge of the affiant.

(s) Parley Probst

Subscribed and sworn to before me this 23rd day of March A.D. 1964.

(s) Glen M. Hatch

The foregoing claim of Parley Probst in the amount of ..... is hereby approved and allowed the ..... day of ....., A.D. 1964.

Administratrix of the Estate of
Elizabeth Bumgarner Poowegup
Deceased

The foregoing claim of Parley Probst is hereby allowed this ..... day of ....., A.D. 1964, and the Administratrix authorized to make payment thereof.

.....
Judge

Received a copy of the foregoing this 24th day of March, 1964.

(s) John C. Beaslin
Attorney for Estate